

**Second Initial Public Participation Working Group Draft of the
Constitutional Nexus Guideline for Application of
a State's Sales and Use Tax to an Out-of-State Business
(D*R*A*F*T—03/9709/97)**

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Multistate Tax Commission
Attn: Paull Mines, General Counsel
444 North Capitol Street, N.W.
Suite 425
Washington, D.C. 20001
(202) 624-8699—Telephone
(202) 624-8819—Fax
pmines@mtc.gov

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Constitutional Nexus Guideline for Application of
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I. *Preliminary Comments.*

- A. *Differentiating a sales tax, a use tax, and a use tax collection duty.* A state sales or use tax can potentially arise in three different contexts with respect to an **out-of-state business**: (i) the application of a sales tax; (ii) the application of a use tax; and (iii) the imposition of a use tax collection duty with respect to a third-party's obligation to pay the use tax to the taxing State.
- B. *Form of sales and use taxes.* There are three types of sales and use taxes: a vendee form, a vendor form and a combined form. A vendee sales tax is a sales tax that places the legal incidence of the tax on the purchaser, even though the seller may be required to collect and remit the tax from collections made from the purchaser. A tax that places the legal incidence of the sales tax on the seller but also requires the seller to collect the tax from the purchaser is also a vendee sales tax. A vendor sales tax is a sales tax that places the legal incidence of the tax on the seller, even though the seller may have the option to collect the tax from the purchaser. A combined sales tax is a sales tax that displays aspects of both a vendee form and a vendor form.
- C. *Nexus.* One necessary condition to the application of a state sales tax or a state use tax, or the imposition of a use tax collection duty, is the satisfaction of the U.S. constitutional requirement of nexus. Nexus means there is sufficient connection with the taxing State for that State to apply its sales or use tax or to impose a use tax collection duty.
- D. *Limitation of application of Guideline.* This Guideline describes when, under the U.S. Constitution, sales and use tax nexus with respect to an **out-of-state business** is present. Nexus must be present in each of three possible circumstances for which a state sales and use tax may apply: the application of a state sales tax, the application of a state use tax, and the imposition of a use tax collection duty. The Guideline does not extend beyond state sales and use taxes. In using the Guideline to determine the presence of nexus under the U.S. Constitution,

users, in addition to determining the presence of nexus with respect to an **out-of-state business**, must also determine in the first instance whether, based upon applicable state law, the taxing State's sales and use tax applies at all and if so, how. This Guideline does not address these state law considerations. Determination of state statutory nexus is, subject to the limitations of the U.S. Constitution, the province of the state legislatures.

II. *Due Process Clause and Commerce Clause define nexus.* The Due Process Clause and the Commerce Clause of the U.S. Constitution define U.S. constitutional nexus. Before a taxing State may apply a sales tax or a use tax, or impose a use tax collection duty, the application or imposition must satisfy the nexus requirements of both Clauses.

A. *Due Process Clause Nexus.* "Minimum contacts nexus" is the term that describes the Due Process Clause component of nexus. A determination of minimum contacts nexus is made by reference to the quality and quantity of contacts with the taxing State. Minimum contacts nexus involves notions of fairness and substantial justice in the application of the sales tax or use tax, or the imposition of a use tax collection duty. Provided the magnitude of contact satisfies notions of fairness and substantial justice, minimum contacts nexus is satisfied for:

1. Under minimum contacts nexus, The application of a sales tax (whether in vendee, vendor, or combined form) ~~may be applied~~ to a taxable **sale** concluded by an **out-of-state business**, when the taxable **sale** occurs in the taxing State.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A sells large scale electrical generators to **in-state persons** of State 1 without maintaining any business location or the use of personnel or representatives in State 1. The generators sold are sent to State 1 by a private contract carrier selected by Corporation A. Corporation A, responding to a purchase order, ships a generator to an **in-state person** of State 1. Under the terms of the transaction the purchaser's risk of loss does not occur until the generator is tendered for delivery to the **in-state person** in State 1. Regardless of whether transfer of title occurs in State 1 or outside of State 1, the **sale** has occurred in State 1.

2. Under minimum contacts nexus, The application of a use tax (whether the sales tax for which the use tax compensates is a vendee, vendor, or combined form) ~~may be applied~~ to a

taxable **use** of the **out-of-state business**, when the taxable **use** occurs in the taxing State.

*Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A sells tangible goods to **in-state persons** of State 1 by catalogs. The catalogs and goods sold are sent to State 1 by the U.S. Mails. Corporation A purchases some of its inventory for its catalog operation from a supplier in State 1. Corporation A supplies specialized shipping containers to the supplier in State 1 to minimize breakage during shipment. The supplier in State 1 uses the specialized containers to ship the goods it supplies to Corporation A. A **use** of the specialized containers by Corporation A occurs in State 1.*

3. ~~Under minimum contacts nexus, The imposition of~~ a use tax collection duty ~~may be imposed~~ on an **out-of-state business**, when

- a. The **out-of-state business** is present in the taxing State; ~~provided, the out-of-state business has not established that its presence is de minimis~~; or

*Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A sells tangible goods to **in-state persons** of State 1 by catalogs. The catalogs and goods sold are sent to State 1 by the U.S. Mails. Corporation A maintains an office in State 1 that is devoted to operations unrelated to the actual selling of goods by catalog. Corporation A is present in State 1. See II.C.2.*

- b. The **out-of-state business purposefully, on its own or through a representative**, avails itself of the benefits of an economic market in the taxing State, ~~either on its own or through a representative~~, and the magnitude of the contacts satisfies notions of fairness and substantial justice in imposing a use tax collection duty, ~~provided, the use tax collected pertains to the business occurring in economic market of the taxing State including, without limitation, the engaging in of regular and systematic solicitation~~ of business in the taxing State; or

- c. The **out-of-state business** engages, either on its own or through a **representative**, in **regular and systematic solicitation** of business in the taxing State and the magnitude of the contacts satisfies notions of fairness and substantial justice in imposing a use tax collection duty.

*Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that an independent contractor representing Corporation A enters State 1 on an unscheduled basis for an average of two days per year to solicit orders for the sale of merchandise to **in-state persons**. State 1 is a part of the assigned territory of the independent contractor even though the **sales** made to **in-state persons** of State 1 are not numerous or significant to the overall operation of the business. Corporation A engages in **regular** and **systematic solicitation** in State 1. Because State 1 is identified by Corporation A as a part of its market, the **occasional** entry of the representative is a normal business activity undertaken by Corporation A and is in furtherance of the business of Corporation A.*

B. *Commerce Clause Nexus.* “Substantial nexus” is the term that describes the Commerce Clause component of nexus. Substantial nexus protects interstate and foreign commerce from unreasonable burdens that would impair the free flow of that commerce.

1. ~~Under substantial-Substantial~~ nexus, is satisfied for the application of a sales tax (whether in vendee, vendor, or combined form) ~~may be applied~~ to a taxable **sale** concluded by an **out-of-state business**, when the taxable **sale** occurs in the taxing State.

See Example 1 of II.A.1.

2. ~~Under substantial-Substantial~~ nexus, is satisfied for the application of a use tax (whether the sales tax for which the use tax compensates is a vendee, vendor, or combined form) ~~may be applied~~ to a taxable **use** of the **out-of-state business**, when the taxable **use** occurs in the taxing State.

See Example 1 of II.A.2.

3. ~~Under substantial-Substantial~~ nexus, is satisfied for the imposition of a use tax collection duty ~~may be imposed~~ on an **out-of-state business**, when
 - a. The **out-of-state business** is physically present in the taxing State, *provided*, the **out-of-state business** has not established that its presence is *de minimis*; or
 - b. The **out-of-state business** lacks a physical presence in the taxing State but the business’ connection with the taxing State is not limited to contact with its customers by

common carrier or the U.S. mail and the imposition of a use tax collection duty does not unreasonably burden interstate or foreign commerce.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A makes catalog sales of tangible personal property to **in-state persons** of State 1. As a part of its normal business practice, Corporation A retains from time to time purchase money security interests¹ in merchandise it sells on installment to **in-state persons** of State 1. An **out-of-state business regularly and systematically** securing purchase money security interests in merchandise that it sells on installment to **in-state persons** of State 1 has established a meaningful commercial connection with State 1 so that imposition of a use tax collection duty with respect to sales that it makes to **in-state persons** of State 1 does not unreasonably burden commerce. It is irrelevant to this conclusion whether Corporation A retains the purchase money security interests it acquires or assigns them immediately following their acquisition to a third-party.

C. *Concept of physical presence in taxing State.* An **out-of-state business** is physically present in the taxing State within the meaning of II.A.3.a. and II.B.3.a., when the business engages in one or more of the following activities:

1. maintains (a) the **permanent** presence of one or more employees; or (b) the **temporary** presence of one or more employees where the **temporary** presence is **significantly associated with the ~~out-of-state business~~' ability of the out-of-state business to establish and maintain the market in the taxing State** with respect to the sale for which the possible use tax collection duty may be imposed.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A stations in State 1 for an indefinite duration that is likely to exceed one year in length an on-site "print engineer," an employee of Corporation A, to oversee quality control at the printer of corporation A's national catalogs. Corporation A has a presence in State 1. The indefinite presence of one or more employees in State 1 is **permanent** and constitutes physical presence, even if the stationed employee is not directly associated with the establishment and maintenance of a market in State 1.

¹A purchase money security interest in the context of this example is the taking or retention by the **out-of-state business** of the collateralizing merchandise to secure all or part of its purchase price.

192 *Example 2:* Corporation A is an **out-of-state business** with respect to
193 State 1. Corporation A decides that it will for a period likely to exceed
194 one year indefinitely maintain through rotation of its employees at
195 least one employee in State 1 to foster positive relationships with its
196 important suppliers. The identity of the specific employee in State 1
197 changes from time in accordance with the rotation system. The **out-**
198 **of-state business** maintains a **permanent** presence of one or more of
199 its employees in State 1 and has a physical presence in State 1.

200 *Example 3:* Corporation A is an **out-of-state business** with respect to
201 State 1. Corporation A assigns State 1 as a part of the sales territory
202 to be covered by a salesperson who lives and maintains his/her office
203 outside State 1. The salesperson travels to State 1 on an **occasional**
204 basis, depending upon market conditions. Corporation A has a
205 presence in State 1. The **occasional** presence in State 1 of a
206 salesperson with an assigned territory in that State is **significantly**
207 **associated with** ~~Corporations A's~~ **the ability of the out-of-state**
208 **business (Corporations A) to establish and maintain a market in**
209 **the taxing State** (State 1) with respect to the sale for which the
210 possible use tax collection duty may be imposed. This presence
211 though limited in time constitutes physical presence.

212 *Example 4:* Corporation A is an **out-of-state business** with respect to
213 State 1. Corporation A ~~temporarily on a temporary basis~~ sends
214 different employees into State 1 to assist its independent legal
215 counsel in that State to defend a lawsuit. ~~The presence of the~~
216 ~~employees in State 1 is not permanent.~~ Additionally, ~~the~~ **The**
217 **temporary** presence of the employees is not **significantly**
218 **associated with the ability of the out-of-state business**
219 **(Corporation A) to establish and maintain a market in the taxing**
220 **State** (State 1) with respect to the sale for which the possible use tax
221 collection duty may be imposed. Corporation A has no physical
222 presence in State 1 by virtue of the **temporary** presence of its
223 employees in that State to assist in the defense of a suit.

224 *Example 5:* Corporation A is an **out-of-state business** with respect to
225 State 1. One of Corporation A's employees lives in State 1. The
226 employee's presence in State 1 is not associated with the activities of
227 Corporation A. ~~and~~ Corporation A has no presence in State 1 by
228 virtue of the **mere** residence of **one of** its employee.

229 *Example 6:* Corporation A is an **out-of-state business** with respect to
230 State 1. Corporation A permits on an indefinite basis that is likely to
231 exceed one year one of its employees who lives in State 1 to
232 telecommute from his/her residence in State 1. The **out-of-state**
233 **business** maintains a **permanent** presence of one or more of its
234 employees in State 1 and has a physical presence in State 1.

2. owns, **leases**, or maintains real property located in the taxing State, including, without limiting the foregoing, an office or other facility; or

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A maintains an office in State 1. The activities of the office are not related to the catalog sales Corporation A makes to persons in State 1. The office constitutes physical presence, even if the office's activities do not relate to the sales being made by the Corporation A to persons in State 1.

~~Example 12:~~ Corporation A is an **out-of-state business** with respect to State 1. Corporation A owns investment real estate in State 1 that is not related to its business of making catalog sales to persons in State 1. Corporation A has a physical presence in State 1. Ownership of real estate in State 1, even if unrelated to the business conducted with respect to State 1, constitutes the holding of property in State 1. The principle of dissociation of *Norton Co. v. Dept. of Revenue of Illinois*, 340 U.S. 534 (1951), however valid with respect to direct taxes, is inapplicable to ~~all the vendee, vendor and combined~~ forms of sales and use taxes.

~~Example 23:~~ Corporation A is an **out-of-state business** with respect to State 1. Corporation A owns, **leases**, licenses or uses billboards, showrooms, advertising kiosks, sample and display rooms, or other similar property devoted to advertising, **solicitation**, ~~or and~~ other marketing purposes. Corporation A maintains real property in State 1. Corporation A has a physical presence in State 1.

~~Example 3: Corporation A is an **out-of-state business** with respect to State 1. Corporation A **maintains** an office in State 1. The activities of the office are not related to the catalog sales Corporation A makes to persons in State 1. The office constitutes physical presence, even if the office's activities do not relate to the sales being made by the Corporation A to persons in State 1.~~

3. owns, **leases**, or maintains tangible personal property located in the taxing State; or

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A in accordance with its normal business practice consigns tangible personal property to unrelated persons in State 1 who thereafter sell or **lease** or license the consigned property. The owner of property consigned to another holds property in the State where the property is consigned. Corporation A has a physical presence in State 1.

~~Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A makes catalog sales of tangible personal property to **in-state persons** of State 1 and in accordance with its normal business practice secures from time to time a security interest in merchandise sold on installment to **in-state persons** in State 1. An **out-of-state business** holding a security interest in tangible personal property holds an interest in the property. Corporation A has a physical presence in State 1.~~

Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A purchases from unrelated businesses at discount, and/or lends money with security provided by, accounts receivable, including accounts whose payment is secured by security interests in property located in State 1. Corporation A is not the original obligee of any the accounts. In the absence of other connections, Corporation A does not have a physical presence in State 1.

Example 3: Corporation A is an **out-of-state business** with respect to State 1. Corporation A, in accordance with its normal business practice, orders and stores (following its supplier's shipment) paper stock at the printer of its catalogs which is located in State 1. Paper stock quantities in significant amounts are held at the printer for one month periods four times each year to support the four-season printing of its national catalog. Corporation A has physical presence in State 1.

Example 4: Corporation A is an **out-of-state business** with respect to State 1. Corporation A as an experiment to increase market share hires for one sport's season an airplane to navigate around an outside baseball stadium in State 1 to advertise its product to fans attending games in the arena. Corporation A maintains tangible personal property in State 1 temporarily. Corporation A has physical presence in State 1.

Example 5: Corporation A is an **out-of-state business** with respect to State 1. Corporation A stores some its business records with its auditors who are located in State 1. Corporation A has physical presence in State 1 by virtue of the storage of some of its accounting records in State 1.

Example 6: Corporation A is an **out-of-state business** with respect to State 1. Corporation A in accordance with its normal business practice stores finished product at a supplier in State 1 that fabricated the product for Corporation A until such time as it has a sufficient quantity for the product to be economically shipped in bulk to a point outside the State. The storage of finished product at the

fabricator of that product until it can be economically shipped in bulk outside the State constitutes physical presence.

4. [Reserved.] (This paragraph is reserved for a possible discussion of physical presence based upon an **out-of-state business** relationship to intangible property located in the taxing state.)

5. retains a **representative** or **representatives** who solicit or conduct business or perform services on behalf of the **out-of-state business** in the taxing State and either this activity is **significantly associated with the ability of the out-of-state business to establish and maintain a market in the taxing State** with respect to the sale for which the possible use tax collection duty may be imposed or is conducted by the representative or an employee of an representative with the understanding that the activity will be performed on a substantially full-time basis for a permanent period and the services are performed under the primary direction or control of the out-of-state business.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A makes catalog sales of tangible personal property to persons in State 1. Corporation A hires an independent contractor who is not an **in-state person** to provide customer complaint and warranty services to the **out-of-state business** customers in State 1. The independent contractor makes visits in State 1 to resolve customer complaints and to perform warranty service on the product sold by Corporation A. Corporation A has a physical presence in State 1. The contractor visits are **significantly associated with the ability of the out-of-state business (Corporation A) to establish and maintain a market in the taxing State (State 1)** with respect to the sale for which the possible use tax collection duty may be imposed.

Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A makes catalog sales of tangible personal property to **in-state persons** of State 1 and makes in-state deliveries of merchandise sold or its catalogs to **in-state persons** by a **contract carrier** and not a **common carrier** acting in its **common carrier** status. Corporation A secures benefits beyond mere delivery at a reduced price from dealing with its shipper on a private contract basis. Corporation A has a presence in State 1. The **contract carrier** is a **representative** of the **out-of-state business**. The deliveries do not fall within the limited safe harbor of contact with customers being limited to **common carrier** and U.S. mail. *See National Bellas Hess,*

Inc. v. Dept. of Revenue of Illinois, 386 U.S. 754 (1967), and *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992).

Example 3: Corporation A is an **out-of-state business** with respect to State 1. Corporation A sells tangible goods to **in-state persons** of State 1 by catalogs. The catalogs and goods sold are sent to State 1 by the U.S. Mails. Corporation A hires a representative to determine market conditions in State 1. The representative for Corporation A seeks information in State 1 about the reliability and performance, pricing, and availability of competing products, general market conditions, customers' financial condition, fashion trends, and other local information. Corporation A has a physical presence in State 1. The **representative** is conducting business or performing services on behalf of the **out-of-state business** in the taxing State and this activity is **significantly associated with the ability of the out-of-state business** (Corporation A) **to establish and maintain a market in the taxing State** (State 1) with respect to the sales for which the possible use tax collection duty may be imposed.

Example 4: Corporation A is an **out-of-state business** with respect to State 1. Corporation A hires Corporation B that is located in State 1 to designate one of its employees to maintain Corporation A's books of account on an exclusive basis for a period of time likely to exceed one year. Corporation A has a physical presence in State 1 because of this relationship.

6. retains a **representative** or **representatives** who are not described in paragraph 4 but who own, **lease**, use or maintain an office, ~~or~~ other establishment, or property in the taxing State, and this property is used in the representation of the **out-of-state business** in the taxing State and is **significantly associated with the ability of the out-of-state business to establish and maintain a market in the taxing State** with respect to the sale for which the possible use tax collection duty may be imposed; or

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A is a reseller of interexchange telecommunications services and sells prepaid phone cards as one method for providing this service. In order to initiate the interexchange telecommunications originating from State 1, the holder of the prepaid phone card must use the local exchange and the facilities-based interexchange carrier, both of which have property in State 1 that actually permit the call to go through. By virtue of arrangements that exist for interconnectivity, the property of the local exchange carrier and the

interexchange carrier that facilitates the completion of the call is **significantly associated with the ability of the out-of-state business** (Corporation A) **to establish and maintain a market in the taxing State** (State 1) with respect to the sale for which the possible use tax collection duty may be imposed. Corporation A by virtue of its use of the property of its **representatives** in State 1 has physical presence in State 1.

Example 2: [Reserved.] (This example and possibly others are reserved for a possible illustration of physical presence based upon the ownership, lease, use or maintenance of an establishment in the taxing State that facilitates the conduct of a business through computer-based telecommunications.

7. [Reserved.] (This paragraph is reserved for a possible discussion of physical presence based upon a representative of an **out-of-state business** having a relationship to intangible property located in the taxing state).
8. either on its own or through a **representative** or **representatives**, maintains in the taxing State by private contract, and not by purchase from a **common carrier** in the **common carrier's** status as a **common carrier**, telecommunication linkage that is **significantly associated with the ability of the out-of-state business to establish and maintain a market in the taxing State** with respect to the sale for which the possible use tax collection duty may be imposed; or

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A maintains local telecommunications access in State 1 by virtue of an agreement with an interexchange carrier not acting in its capacity as a **common carrier** when dealing with the Corporation A. The carrier by contract with the telecommunications company serving the local exchanges in State 1 arranges for transparent switching that achieves Corporation A's objective of appearing as a business with which the customers in State 1 can access as easily as if the business were located "down the street" in State 1, including the making of a local telephone call. Corporation A has presence in State 1. The interexchange carrier acts on behalf of the **out-of-state business** by providing local access and this representation in State 1 is **significantly associated with the ability of the out-of-state business to establish and maintain a market in the taxing State** with respect to the sale for which the possible use tax collection duty may be imposed. ~~(Note there may be many other~~

~~justifications under this example for treating the out-of-state business as having a presence in State 1.)~~

9. ~~either on its own or through a representative or representatives,~~ performs or renders services in the taxing State.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A is a reseller of interexchange telecommunications services. A facilities-based, interexchange telecommunications service provider actually supplies the telecommunications services being resold under bulk purchase contract with ~~the reseller Corporation A~~. Corporation A has presence in State 1. The ~~facilities-based, interexchange telecommunications service provider reseller~~ is providing a service in State 1 ~~on behalf of Corporation A when a subscriber of the reseller places an interexchange call in State 1,~~ because the services are not ~~completely~~ performed until the ~~purchased~~ telecommunications services are delivered in State 1.

Example 2: [Reserved.] (This example and possibly others are reserved for possible illustration of physical presence based upon the delivery of services into the taxing State through computer-based telecommunications.)

D. *Concept of de minimis and application of de minimis concept.*

1. *Concept of de minimis.* An **out-of-state business'** presence in the taxing State is *de minimis* when that presence ~~is either trivial does not exceed a slightest presence or is inadvertent.~~ The presence of an **out-of-state business** in the taxing State ~~is not trivial, and thereby exceeds de minimis, when~~

- a. ~~More than slightest~~ **Slightest presence.** ~~The Although not easily stated in objective terms,~~ presence of the **out-of-state business** ~~does not~~ exceeds a **slightest presence** ~~when the collective judgment of disinterested observers would conclude the presence is a silly premise upon which to support a finding of nexus, and enables the out-of-state business to enjoy the benefits, privileges and services of an organized society provided by the taxing State;~~ or

- b. ~~Conscious submission to jurisdiction. Inadvertent.~~ The presence is ~~not~~ inadvertent, ~~but when it does not~~ represents a conscious choice of the **out-of-state business** to submit to the jurisdiction of the taxing State. A conscious choice to submit to the jurisdiction to the taxing

~~State exists when , as for example where~~ the presence arises from a **regular** and **systematic** business practice, the pursuit of an established company policy on a continuing basis, an affirmative decision of management, or a step taken to assist in the establishment and maintenance of a market in the taxing State with respect to the sale for which the imposition of a use tax collection obligation may be imposed.

Example 1: Corporation A is an **out-of-state business** with respect to State 1. Corporation A sells tangible goods to **in-state persons of** State 1 by catalogs. The catalogs and goods sold are sent to State 1 by the U.S. Mails. Corporation A also has developed a proprietary software that allows its customers to order goods through computer-assisted telecommunications from their location in State 1 and other States. Corporation A licenses four copies of this software on diskettes that it sends to the four licensees in State 1. The taxpayer maintains (and there is no evidence suggesting a contrary understanding) that the diskettes were not **significantly associated with the ability of the out-of-state business** (Corporation A) **to establish and maintain the market in the taxing State** (State 1). Although Corporation A has some physical presence, this presence is *de minimis*. It would be silly to support a finding of nexus on the presence of four diskettes containing proprietary ordering software where the taxpayer maintains the software was not significantly associated with its ability to establish and maintain its market in State 1 and there is no evidence suggesting the contrary.

Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A stores some its business records with its auditors who are located in State 1. The records are needed by the auditors to do their work for Corporation A. Although Corporation A has some physical presence, this presence is *de minimis*. It would be a silly to support a finding of nexus on the presence of business records of the **out-of-state business** being in the hands of the business' auditors where the records are needed for the auditors' work.

Example ~~1~~ 3: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that a customer in violation of its affirmative covenants to the business moved the property sold by installment and in which the business has a perfected security interest from an authorized locality in another State to State 1. The presence of Corporation A in State 1 is *de minimis*. The presence is ~~not more than a~~ **"slightest presence"** ~~and inadvertent, because it~~ did not ~~in any event~~ arise from ~~a Corporation A's~~ conscious submission to the jurisdiction of State 1.

~~Example 2: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that that it has a policy of installment selling to **in-state persons** and from whom it in accordance with its normal business practice secures a perfected security interest in the property sold that after the sale is located in State 1. The presence of Corporation A in State 1 is not *de minimis*. The presence derived from Corporation A's security interest in property located in State 1 arises from a conscious choice to submit to the jurisdiction of State 1 because the security interests were secured as a part of its normal business practice that reflects either a **regular** and **systematic** business practice, an established company policy pursued continuously, an affirmative decision of management or a step taken to assist in the establishment and maintenance of a market in State 1 with respect to the sale for which the imposition of a use tax collection obligation may be imposed.~~

Example 4: Corporation A is an **out-of-state business** with respect to State 1. Corporation A's business is the rental of scaffolding for use at construction projects. Corporation A's business is generally limited to contractors who operate in the same State as Corporation A. Corporation A has a presence in State 1 derived solely from the fact that one of its customer's has rented scaffolding that it has taken to a construction project in State 1. Corporation A's rental agreement with this customer gives no indication, and the personnel of Corporation A have no understanding, as to where the scaffolding was to be used. Except for this one instance, Corporation A has no indication that any of its scaffolding has ever been used before in State 1. The presence of Corporation A in State 1 is *de minimis*. The presence is inadvertent, because it did not arise from Corporation A's conscious submission to the jurisdiction of State 1.

~~Example 3 5: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that an employee on his/her own initiative, and without the territory being assigned to him/her, entered State 1 and **made a secured an order for a single sale in the amount of \$100**. Corporation A allowed the **sale** to go through on a one-time basis to avoid embarrassment to the company. The presence of Corporation A in State 1 is *de minimis*. The presence is ~~not more than a "slightest presence,"~~ was inadvertent, ~~and because it did not in any event~~ arise from a conscious submission to the jurisdiction of State 1. Corporation A's presence in State 1 also does not exceed a slightest presence. It also would be a silly to support a finding of nexus on the presence of a single, in-person solicitation of a \$100 sale on behalf of the **out-of-state business** in State 1.~~

Example-4 6: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that an independent contractor representing the business enters State 1 on an unscheduled basis for an average of two days per year to ~~make sales within solicit orders for the sale of merchandise to in-state persons of~~ State 1. State 1 is a part of the assigned territory of the independent contractor even though the ~~sales in-made to in-state persons of~~ State 1 are not numerous or significant to the overall operation of the business. ~~The presence of Corporation A in State 1 is not de minimis.~~ The ~~presence derived from the occasional~~ entry of ~~an independent contractor representative making sales engaged in regular and systematic solicitation~~ in State 1 constitutes a presence. ~~arises from~~ The presence of Corporation A in State 1 is not de minimis. Corporation A has made a conscious choice to submit to the jurisdiction of State 1 because State 1 is ~~assigned territory of the independent contractor identified as a part of Corporation A's market.~~ In addition, regular and systematic solicitation exceeds a slightest presence. Corporation A as a part of its normal business operations deliberately seeks to further its business, i.e., establish and maintain the market, by activities that give rise to physical presence. Disinterested observers would not conclude that these activities would be a silly premise upon which to support a finding of nexus.

Example-5 7: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that the business has hired an independent contractor that is not an **in-state person** to perform on behalf of the business warranty service with respect to property sold to **in-state persons** and the independent contractor comes into State 1 on an unscheduled basis for an average of two times per year to perform the warranty service. The presence of Corporation A in State 1 is not *de minimis*. The presence derived from the **occasional** entry of ~~an independent contractor representative~~ to perform warranty service on average of two times per year in State 1 arises from ~~a Corporation A's~~ conscious choice to submit to the jurisdiction of State 1. Corporation A has effected an arrangement for the performance of its warranty services ~~obligation to be performed~~ in State 1 that is important to the establishment and maintenance of the market in State 1. ~~and This arrangement~~ reflects either a **regular** and **systematic** business practice, an established company policy pursued continuously, or an affirmative decision of management. In addition, the occasional performance of in-state warranty service on behalf of the out-of-state business exceeds a slightest presence. Corporation A as a part of its normal business operations deliberately seeks to further its business, i.e., establish and maintain the market, by activities that give rise to

physical presence. Disinterested observers would not conclude that these activities would be a silly premise upon which to support a finding of nexus.

Example-6 8: Corporation A is an **out-of-state business** with respect to State 1. Corporation A has a presence in State 1 derived solely from the fact that it owns a 10 acre parcel of undeveloped real property in State 1. The real property is not used in the business of Corporation A. The presence of Corporation A in State 1 is not *de minimis*. The presence derived from Corporation A's ownership of real property located in State 1 arises from a conscious choice to submit to the jurisdiction of State 1, because a corporation cannot acquire ownership of real property without the affirmative decision of management. In addition, the ownership of real estate exceeds a slightest presence. Corporation A has deliberately established and thereafter maintains a physical presence in State A. Disinterested observers would not conclude that presence arising from the ownership of a 10 acre parcel of undeveloped real property would be a silly premise upon which to support a finding of nexus.

2. *Proof of de minimis.* If an **out-of-state business** is present in the taxing State, then the **out-of-state business** has the burden of establishing its presence is *de minimis* by clear and cogent evidence.

E. *Duration of Nexus.* Once minimum contacts nexus or substantial nexus exists under the principles of this guideline, that nexus will continue to exist without any additional circumstances through the last day of the twelfth month following the temporal point at which the nexus was first established with respect to subsequent sales when the pre-existing nexus in whole or in part was a proximate cause for the sale.

F. *Definitions.* The following definitions apply to the terms used in this guideline, including the examples. The definitions do not apply outside of the guideline. Thus, the definitions do not apply to the same or similar terms used in an adopting State's statutes, or regulations, rules or other official communications without an affirmative statement to that effect.

1. [Reserved.] (This paragraph is reserved for possible definition of the term "business situs".)
2. **"Common Carrier."** The term "common carrier" means one who holds itself out to the public as engaged in the business of providing transportation of persons or property, including

intangible property or services through telecommunications,
from place to place for compensation on an indifferent basis.

3. **“Contract Carrier.”** The term “contract carrier” means one
who is in the business of providing transportation of persons
or property, including intangible property or services through
telecommunications, from place to place for compensation
under exclusive agreement.

4. **“In-State Person.”** The term “in-state person” means any
individual who is resident in, or any entity which is organized
under the laws of or commercially domiciled in, this State.

5. **“Lease.”** The term “to lease” means any arrangement,
including a license, allowing for the use, possession, or
occupancy of property in return for rent or other
consideration. The term does not extend to non-operating
leases that are strictly financing mechanisms.

~~6. **“Maintain.”** The term “maintain” means to keep in existence,~~
~~continuity, or operation.~~

~~Ed. Note: Is the definition of “maintain” necessary? Not all~~
~~appearances of the term “maintain” are in bold-face, because it is~~
~~believed that the definition is not appropriate to the way the word~~
~~is used in those instances.~~

~~76.~~ **“Occasional.”** The term “occasional” means occurring at
infrequent or irregular intervals in a State.

~~87.~~ **“Out-of-State Business.”** The term “out-of-state business”
means any individual or entity conducting business that is
not an **in-state person**.

~~98.~~ **“Permanent.”** The term “permanent” means a duration
lasting one year or more or a duration of an indeterminate or
indefinite length that at anytime during its existence is likely
to exceed one year.

~~1011.~~ **“Purposefully.”** The term “purposefully” means willfully
accessing a market in a State.

~~1112.~~ **“Regular.”** The term “regular” means normal but without
regard to the interval or frequency of occurrence or,
alternatively, occurring at fixed or uniform intervals ~~in a~~
State.

~~1213.~~ **“Representative.”** The term “representative” means any indi-
vidual or entity that solicits sales, conducts business, or pro-
vides services in the taxing State on behalf of an **out-of-state**

business. The term does not include employees of the out-of-state business. The term includes, without any limitation on the foregoing, agents, corporate or other business entities, related or unrelated to the **out-of-state business**, and independent contractors. The term also includes sub-representatives. A representative may be resident or non-resident in the taxing State.

~~13~~**14.** **“Sale.”** The term “sale” means for tangible goods the point in time when there has been both the transfer of either title or possession and the passage of risk of loss to the purchaser ~~} or insert adopting State’s concept of a sale that gives rise to the taxable moment for imposing a sales tax on the sale of tangible goods~~. The term “sale” for tangible goods that have been leased to a third-party also means the point in time where both the transfer of possession of the tangible good to the third-party and the agreement for leasing have been completed. The term “sale” means for services or intangible goods ~~the commencement of the receipt of the service or of the delivery of the intangible property~~ ~~} or insert adopting State’s concept of a sale that gives rise to the taxable moment for imposing a sales tax on the sale of services or intangible property~~.

~~Ed. Note: Not all appearances of the term “sale” are in bold face, because it is believed that the definition is not appropriate to the way the word is used in those instances. It may be preferable to use the term “taxable sale” to differentiate when the defined term is intended.~~

15. “Significantly associated with the ability of the out-of-state business to establish and maintain the market.” The term “significantly associated with the ability of the out-of-state business to establish and maintain the market” means activities that (i) involve contact with the customer or potential customer in the capacity as a customer or potential customer or (ii) involve the collection of information that pertains to the market in the taxing State or to information about a customer or potential customer that furthers the business of the out-of-state business with respect to the customer or potential customer in the capacity of a customer

or potential customer.² It is not necessary that the activity actually establish and maintain the market, only that the activity be significantly associated with the ability of the **out-of-state business** to do so.

14. ~~**"Slightest Presence."** The term "slightest presence" means a level of activity or contact that is neither (i) a **regular** and **systematic** business practice; nor (ii) quantitatively or qualitatively significant to the commercial interest of the business.~~

15. ~~**"Solicitation."** The term "solicitation" means (i) speech or conduct that explicitly or implicitly invites an order for purchase or other transfer of property or services; or (ii) activities that neither explicitly nor implicitly invite an order for purchase or other transfer of property or services, but are entirely ancillary to requests for an order.~~

~~Ed. Note: Is the definition of "solicitation" needed?~~

1615. **"Systematic."** The term "systematic" means methodically planned in furtherance of the business of the **out-of-state business**.

16. **"Temporary."** The term "temporary" means a duration that is not permanent.

17. **"Use."** The term "use" means for tangible goods, services and intangible property {storage, use or other consumption of the object of the use tax} ~~{or insert adopting State's concept of a use that gives rise to the taxable moment for imposing a use tax on tangible goods, services and intangible property}.~~

~~Ed. Note: Not all appearances of the term "use" are in bold face, because it is believed that the definition is not appropriate to the way the word is used in those instances. It may be preferable to use the term "taxable use" to differentiate when the defined term is intended.~~

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²Activities falling within **"significantly associated with the ability of the out-of-state business to establish and maintain the market"** includes solicitation and marketing directed to in-state persons, including market research for sales to be made into the taxing State; product fulfillment activities, including delivery, distribution, installation, training, testing, and consultation; repair services that are on behalf of the **out-of-state business**; and customer adjustment services, including handling of complaints and returns. Other activities include providing the seller with information about the market, including product performance, competing products, pricing, market conditions, and trends; existing and upcoming products; customer financial status; and other critical local information.